PP v. AZIZOL AISHA

COURT OF APPEAL, PUTRAJAYA
ZAKARIA SAM JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CRIMINAL APPEAL NO: K-05(S)-107-04-2015]
5 NOVEMBER 2015

CRIMINAL PROCEDURE: *Mitigation – Plea of guilty – Accused initially charged for murder but proffered alternative charge for culpable homicide – Accused pleaded guilty to alternative charge and appealed for reduction of period of imprisonment – Accused sentenced to ten years imprisonment – Whether guilty plea entitled accused to discount in sentence – Whether plea bargaining warranted lenient sentence – Whether plea bargaining in respect of charge or sentence – Penal Code, ss. 302 & 304(a) – Criminal Procedure Code, s. 172C*

The respondent had shot dead one Kia Chean Joo ('the deceased') at a close range using a shotgun. Seven pellet fragments were found embedded in the deceased's face and head. According to the pathology report, the gunshot injury to the head was directly fatal in nature. At the High Court, the respondent was initially charged for murder, an offence under s. 302 of the Penal Code ('the Code'). However, the prosecution preferred an alternative charge against the respondent for culpable homicide not amounting to murder under s. 304(a) of the Code, to which the respondent pleaded guilty. The respondent signed an application for plea bargaining in Form 28A, pursuant to s. 172C of the Criminal Procedure Code. After proceedings resumed, the respondent tendered Form 28A and in mitigation appealed for, *inter alia*, the period of imprisonment be reduced to five years. In reply, the prosecution submitted that the respondent's plea of guilt did not entitle him to a discount and therefore, a strict punishment should be meted out. The prosecution further submitted that even though there was plea bargaining, it did not necessarily mean that a lenient sentence should be imposed. Taking into account public interest and the fact that sentencing was the discretion of the trial court, the High Court Judge ('HCJ') sentenced the respondent to ten years imprisonment. Hence, the present appeal by the prosecution. It was the prosecution's contention that the deceased was killed in a cruel and brutal manner and therefore, a sentence of at least 15 years imprisonment should be imposed on the respondent. The respondent argued, *inter alia*, that the respondent's plea was a qualified plea and there should be a re-trial if the sentence was altered. The issues that arose for the court's determination were (i) whether the plea bargaining was in respect of the charge or the sentence; and (ii) whether the sentence was wrong and manifestly inadequate.

Held (allowing appeal; sentencing respondent to 18 years imprisonment) Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) Based on the notes of proceeding, it was clear that the plea bargaining was in regard to the charge which was reduced from s. 302 for murder to s. 304(a) for culpable homicide not amounting to murder. The sentence was left to the discretion of the HCJ. In other words, there was no agreement on the sentence. As such, there was no impediment to the prosecution lodging the present appeal. The respondent's plea of guilt was an unqualified plea of guilt. This was not a suitable case to set aside the conviction and sentence and remit the case to the High Court for a re-trial before another judge on the original charge. (paras 16, 19 & 20)

(2) The maximum sentence which could be imposed on the respondent under s. 304(a) of the Code was imprisonment for a term of 30 years. A plea of guilt is a strong mitigating factor operating in favour of an accused. However, there may be cases where the offence committed is so serious and the circumstances in which it was committed was so heinous that a plea of guilt need to be given little or no weight. The HCJ appeared to have given undue emphasis to public interest but not to the manner in which the offence was committed. The crime was committed in such a cold-blooded and cruel manner. The respondent's plea of guilt ought to be given no weight. The sentence of ten years imprisonment imposed by the HCJ was manifestly and grossly inadequate. Considering the respondent's age and other mitigating factors operating in his favour, a term of 18 years imprisonment was deemed appropriate. (paras 27-31)

Bahasa Malaysia *Headnotes*

Responden telah menembak mati seorang bernama Kia Chean Joo ('si mati') pada jarak dekat menggunakan senapang patah. Tujuh serpihan peluru dijumpai terbenam dalam muka dan kepala si mati. Menurut laporan patologi, kecederaan tembakan pada kepala, secara langsung membawa maut. Di Mahkamah Tinggi, responden pada asalnya dipertuduh di bawah s. 302 Kanun Keseksaan ('Kanun') atas kesalahan membunuh. Walau bagaimanapun, pihak pendakwaan menawarkan pertuduhan alternatif terhadap responden di bawah s. 304(a) Kanun iaitu mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang, yang mana responden mengaku bersalah. Responden menandatangani satu permohonan rundingan akuan dalam Borang 28A, menurut s. 172 Kanun Tatacara Jenayah. Apabila prosiding diteruskan, responden mengemukakan Borang 28A dan dalam mitigasinya merayu, antara lain, agar tempoh penjara dikurangkan kepada lima tahun. Pihak pendakwaan membalas dengan hujahan bahawa pengakuan bersalah responden tidak melayakkan dia mendapat diskaun dan dengan itu, satu hukuman berat harus dijatuhkan. Pihak pendakwaan menghujahkan lagi, walaupun terdapat rundingan akuan, ini tidak bermaksud satu hukuman ringan harus dikenakan. Mengambil kira kepentingan awam dan fakta bahawa penghukuman adalah budi bicara

mahkamah bicara, Hakim Mahkamah Tinggi ('HMT') menjatuhkan sepuluh tahun penjara terhadap responden. Oleh itu, pihak pendakwaan mengemukakan rayuan ini. Adalah hujahan pihak pendakwaan bahawa si mati dibunuh secara kejam dan zalim dan oleh itu, hukuman penjara sekurang-kurangnya 15 tahun patut dijatuhkan terhadap responden. Responden mendalihkan bahawa, antara lain, rayuan responden adalah rayuan bersyarat dan satu perbicaraan semula mesti dijalankan jika hukuman diubah. Isu-isu yang dibangkitkan bagi pemutusan mahkamah adalah (i) sama ada tawaran rayuan adalah berkenaan pertuduhan atau hukuman; dan (ii) sama ada hukuman tidak sah dan jelas tidak memadai.

Diputuskan (membenarkan rayuan; menjatuhkan hukuman 18 tahun penjara terhadap responden)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan nota prosiding, jelas bahawa rundingan akuan adalah berkenaan pertuduhan yang dikurangkan daripada s. 302 bagi kesalahan membunuh kepada s. 304(a) bagi kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang. Hukuman diserahkan pada budi bicara HMT. Dengan kata lain, tiada persetujuan tentang hukuman. Oleh demikian, tiada halangan buat pihak pendakwaan untuk memfailkan rayuan ini. Pengakuan bersalah responden adalah pengakuan bersalah bersyarat. Kes ini bukan kes yang sabitan dan hukumannya sesuai diketepikan dan tidak sesuai dikembalikan ke Mahkamah Tinggi bagi perbicaraan semula pertuduhan asal di hadapan hakim lain.

(2) Hukuman maksimum yang boleh dikenakan terhadap responden di bawah s. 304(a) Kanun ialah penjara 30 tahun. Pengakuan bersalah adalah satu faktor mitigasi kuat bagi seseorang tertuduh. Walau bagaimanapun, terdapat kes-kes yang kesalahannya terlampau serius dan kesalahan dilakukan dengan cara yang terlampau kejam hinggakan pengakuan bersalah diberi pertimbangan sedikit atau terus tidak dipertimbangkan. Hakim Mahkamah Tinggi seakan-akan memberi pemberatan tidak wajar pada kepentingan awam tetapi tidak pada cara kesalahan tersebut dilakukan. Kesalahan dilakukan dengan cara yang kejam dan zalim. Pengakuan bersalah responden tidak wajar diberi apa-apa pertimbangan. Hukuman sepuluh tahun penjara yang dijatuhkan oleh HMT terlampau kurang. Mempertimbangkan umur responden dan faktor mitigasi lain yang berpihak padanya, tempoh penjara 18 tahun adalah bersesuaian.

Case(s) referred to:

Anuar Abdul Aziz v. PP [2005] 6 CLJ 309 HC ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Fan Yew Teng v. PP [1975] 1 LNS 38 FC ***(refd)***
Haridas Subramaniam & Anor v. PP [2012] 1 CLJ 693 CA ***(refd)***

A *Kesavan Baskaran v. PP [2008] 6 CLJ 390 CA* ***(refd)***
Nelson Gnanaregasam lwn. PP [2010] 3 CLJ 561 CA ***(refd)***
PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC ***(refd)***
PP v. Fam Kim Hock [1956] 1 LNS 83 HC ***(refd)***
PP v. Govindnan Chinden Nair [1998] 2 CLJ 370 HC ***(refd)***
PP v. Loo Chang Hock [1988] 1 CLJ 76; [1988] 2 CLJ (Rep) 263 HC ***(refd)***
B *PP v. Loo Choon Fatt [1976] 1 LNS 102 HC* ***(refd)***
PP v. Manimaran Manickam [2011] 8 CLJ 439 CA ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(refd)***
PP v. Muhamad Arif Sabri & Ors [2014] 1 LNS 604 CA ***(refd)***
PP v. Shari Mohd Shariff [2005] 5 CLJ 439 HC ***(refd)***
PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC ***(refd)***
C *Rahim Usoff & Ors v. PP [1984] 2 CLJ 121; [1984] 2 CLJ (Rep) 439 HC* ***(refd)***
Ramli Kechik v. PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC ***(refd)***
Rex v. Leo De Cruz [1935] 1 MLJ 1 ***(refd)***
Rex v. Teo Cheng Lian and Rex v. Leck Kwee Ser [1949] 1 LNS 81 HC ***(refd)***

Legislation referred to:
D Criminal Procedure Code, s. 172C
Penal Code, ss. 302, 304(a)

For the appellant - Tetralina Ahmed Fauzi; DPP
For the respondent - Naran Singh; M/s Naran Singh & Co

E *[Editor's note: For the High Court judgment, please see PP lwn. Azizol Aisha [2015] 1 LNS 625 (overruled).]*

Reported by Najib Tamby

JUDGMENT

F **Vernon Ong Lam Kiat JCA:**

Introduction

[1] The respondent pleaded guilty to an alternative charge of culpable homicide not amounting to murder under s. 304(a) of the Penal Code and was G sentenced to a term of imprisonment of ten years effective from the date of arrest on 22 February 2011.

[2] This is the Public Prosecutor's appeal against the sentence imposed on the respondent.

H **The Salient Facts**

[3] The respondent was initially charged for committing murder under s. 302 of the Penal Code. The charge reads as follows:

> Bahawa kamu pada 01/06/2010 jam lebih kurang 8.20 malam di tepi Jalan Raya Batu 8 Sik, di dalam daerah Sik, Negeri Kedah, dengan niat telah I membunuh Kia Chean Joo KPT: 770223-02-5634 dengan cara menembak dengan senapang patah lalu menyebabkan kematian oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[4] On the hearing date which fell on 30 March 2015, the learned Deputy Public Prosecutor (DPP) preferred an alternative charge against the respondent for culpable homicide under s. 304(a) of the Penal Code. The alternative charge is as follows:

> Bahawa kamu pada 01/06/2010 jam lebih kurang 8.20 malam di tepi Jalan Raya Batu 8 Sik, di dalam daerah Sik, Negeri Kedah Darul Aman, telah melakukan perbuatan yang menyebabkan kematian Kia Chean Joo (No. K/P: 770223-02-5634) dengan niat hendak menyebabkan kematian, dan dengan itu kamu telah melakukan kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh, dan boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan.

[5] The respondent pleaded guilty to the alternative charge and admitted to the facts of the case ("fakta kes").

[6] At the request of learned counsel for the respondent, the proceedings were stood down to enable the Form 28A to be prepared and signed by the respondent for plea bargaining pursuant to s. 172C of the Criminal Procedure Code (CPC). Pursuant thereto, the respondent signed the application for plea bargaining in Form 28A.

[7] After proceedings resumed, learned counsel for the respondent tendered the Form 28A. Learned counsel's submission in mitigation was as follows:

> … Tertuduh kini berusia 37 tahun. Dan beliau telah ditangkap pada 21.2.2011 Yang Arif. He was caught 1 year later at hospital. Beliau ditangkap semasa mendapat rawatan di Wad 8, Hospital Kulim. Yang Arif apabila hari ini tarikh pertama perbicaraan hendak dimulakan pihak pendakwaan telah menawarkan pertuduhan pilihan Yang Arif. Dan tanpa membuang masa dan setelah berbincang dengan saya dan saya telah berbincang dengan pihak pendakwaan Yang Arif Tertuduh bersedia untuk mengaku salah Yang Arif. Dan pihak kami juga telah mengemukakan satu borang 28A di bawah seksyen 127(c). Yang Arif ini jelas menunjukkan bahawa Tertuduh bersedia membantu pihak pendakwaan untuk menyelesaikan kes ini. Dan juga ini telah menjimatkan masa mahkamah, masa saksi-saksi yang terlibat dan secara keseluruhan Yang Arif kos perbicaraan. Saya pohon fakta ini diambil kira Yang Arif. Sejak Tertuduh di dalam reman beliau berasa kesal beliau berada dengan kawan-kawan beliau sehingga berlaku kejadian ini. Tertuduh memohon beliau diberi peluang untuk kembali ke pangkuan keluarga dan menjadi rakyat yang baik. Memandangkan usia Tertuduh kini berusia 37 tahun hukuman penjara yang berpanjangan mungkin tidak akan memberi peluang kepada Tertuduh untuk menunjukkan beliau telah pulih diri. Yang Arif kepentingan awam juga ada dua fakta Yang Arif. 1. Kepentingan rakyat. Supaya orang tidak melakukan sebagai deterrent dan juga fakta yang ke 2 public interest seperti dalam kes *R v. Kenneth Ball*. Public interest is best serve if the offender is willing to turn into a new way of life. Yang Arif Tertuduh memohon beliau diberi peluang dan pohon hukuman

penjara itu bermula dari tarikh tangkap Yang Arif iaitu 21.2.2011 dan memohon Yang Arif beliau diberi hukuman penjara sebanyak 5 tahun. Itu rayuan daripada Tertuduh Yang Arif. Terima kasih Yang Arif.

[8] The learned judge proceed to hear the victim impact statement of the wife of the deceased which was to the effect that she only wanted justice ("Saya tak ada apa-apa mau cakap. Cuma saya pohon keadilan").

[9] In reply, learned DPP's submission on sentence was as follows:

… Untuk hukuman saya bagi pihak pendakwaan memohon agar hukuman terhadap OKT dikenakan dengan hukuman yang berat sebagaimana yang diperuntukkan di bawah seksyen 304(a) kanun keseksaan Yang Arif atas sebab-sebab yang berikut Yang Arif.

1. OKT yang telah menyebabkan kematian si mati. Di mana si mati telah ditembak dari jarak dekat sepertimana dalam pertuduhan Yang Arif.

…

2. Pihak pendakwaan berhujah bahawa tiada apa-apa motif sebenarnya untuk OKT membunuh si mati dan jika dilihat daripada fakta kes yang dibentangkan tiada apa-apa yang dicuri daripada si mati sendiri selepas kejadian. Tindakan OKT yang menembak si mati dalam jarak dekat adalah satu perbuatan yang kejam. Pihak pendakwaan memohon agar satu hukuman yang bersifat mencegah dikenakan terhadap OKT Yang Arif terutamanya sebagai pencegahan kepada orang awam public interest. Agar pihak awam tidak mengulangi atau melakukan perkara yang sama terhadap orang lain Yang Arif. Seterusnya Yang Arif pengakuan salah OKT terhadap pertuduhan yang dipinda tidak melayakkan OKT apa-apa diskaun sebagaimana yang diperuntukkan dalam kes *PP v. Kandarasan Sankaran* [2010] 1 CLJ 596 dan *PP v. Ramakrishnan* [2012] 9 CLJ 443 dan *PP v. Haridass Subramaniam* [2012] 1 CLJ 693. Akhir pihak pendakwaan memohon mahkamah mengenakan hukuman yang berat terhadap OKT.

[10] In reply, learned counsel for the respondent submitted as follows:

Yang Arif cuma nak reply yang pertama saya percaya tadi kita telah persetujui bahawa mengenai hukuman kita akan serahkan pada mahkamah. Kita telah bincang kedua-dua pihak pohon dicatit Yang Arif. Kita telah bincang plea bargaining dan telah persetujui bahawa mengenai hukuman kita akan serahkan kepada budi bicara mahkamah dan apabila saya rasa begitu hairan DPP minta satu hukuman yang berat. Sebab kita sudah persetujui Yang Arif. Yang kedua Yang Arif mengenai Tertuduh telah tembak dengan jarak yang dekat. Fakta ini langsung tidak dinyatakan dalam fakta kes. Tidak ada Yang Arif. It's coming from her. Tidak dibuktikan. Tak ada Yang Arif kalau kita lihat.

(Yang Arif: "Cermin diturunkan …")

… Don't know who. That's why di para ini Yang Arif para 9. Lebih kurang 5 minit kemudian telah datang sebuah kereta berhenti di sebelah kanan kereta saksi dan si mati. Si mati kemudian telah menurunkan cermin

kereta. Orang yang berada di dalam kereta yang baru sampai tadi telah turunkan cermin kereta penumpang sebelah kiri dan melepaskan tembakan terhadap si mati. Si mati telah tumbang dalam kereta. That's why this case is circumstantial langsung tidak dikatakan Tertuduh yang menembak si mati Yang Arif daripada jarak dekat. Langsung tidak ada fakta itu. Dan kes ini bergantung Yang Arif bergantung kepada keterangan ikut keadaan. Dan sebab itu Yang Arif kedua-dua pihak telah bincang plea bargaining dan Tertuduh telah sedia untuk mengaku salah Yang Arif. Maka dengan itu Yang Arif saya masih dengan apa yang telah saya runding dengan DPP dalam plea bargaining saya, saya akan serahkan kepada Yang Arif tapi saya cuma mohon 5 tahun tapi saya serahkan kepada Yang Arif budi bicara mengenai hukuman. Terima kasih Yang Arif.

DPP's Submission

[11] Learned DPP argued that on the day in question, the deceased and a friend went to Sik to meet someone after receiving a telephone call from an individual about a business proposal. Whilst waiting at Sik, a car came up and stopped at the right side of the deceased's car. The deceased wound down his driver side window. The individuals in the other car wound down the left passenger side window and fired a shot at the deceased. The deceased was shot with a shotgun. There were seven pellet wounds on the deceased's head. The deceased died due to the gunshot injury to the head. The deceased was killed in a cruel and brutal fashion and it was planned. Learned DPP argued that there was no evaluation of the facts by the learned judge. Learned DPP submitted that sentence of ten years is manifestly inadequate and should be set aside. A sentence of at least 15 years imprisonment should be imposed on the respondent (*Nelson Gnanaregasam lwn. PP* [2010] 3 CLJ 561; [2009] 6 MLJ 622 (CA); *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83 (FC)).

[12] Even though there was plea bargaining of the charge (and not of the sentence) in this case, it did not necessarily mean that a lenient sentence should be imposed on the respondent (*PP v. Govindnan Chinden Nair* [1998] 2 CLJ 370; *Kesavan Baskaran v. PP* [2008] 6 CLJ 390 (CA)).

Respondent's Submission

[13] Learned counsel for the respondent argued that they did not apply for the charge to be reduced. The alternative charge under s. 304(a) of the Penal Code was preferred by the DPP on its own accord.

[14] Learned counsel argued that there was a plea bargaining of the sentence and the DPP had agreed that they will not be appealing against the sentence (RR17). The plea bargaining was done in chambers. Learned counsel argued that during the plea bargaining, he had asked for ten years and the DPP agreed. The learned judge is bound by it. The respondent's plea is a qualified plea and if the sentence is altered, then there should be a retrial (*PP v. Manimaran Manickam* [2011] 8 CLJ 439 (CA)).

A **Decision**

[15] The first issue for determination is whether the plea bargaining in question was in respect of the charge or of the sentence. According to the notes of proceedings (RR14), the DPP said:

B > Dalam kes ini Yang Arif OKT telah dituduh di bawah Seksyen 302 Kanun Keseksaan. Walau bagaimanapun pihak pendakwaan setuju untuk menawarkan pertuduhan pilihan di bawah Seksyen 304(a) Kanun Keseksaan. **Terdapat plea bargaining tentang pertuduhan** bawah seksyen 172(c) Kanun Acara Jenayah. … (emphasis added)

C **[16]** It is clear from the notes of proceedings that the plea bargaining was in regard to the charge which was reduced from s. 302 for murder to s. 304(a) for culpable homicide. In this regard, learned counsel for the respondent's submission is that it was agreed that the prosecution would not appeal against the sentence and that they would leave the sentencing to the discretion of the learned judge. Be that as it may, we note that there is no acknowledgement D or confirmation of the same by the learned DPP or by the learned judge in the notes of proceedings.

[17] At the outset of the proceedings, the learned DPP had already said that there was a plea bargaining of the charge. The learned DPP's statement was E not challenged or disputed by the respondent. Learned counsel for the respondent only came out with his remarks during the mitigation after the respondent had pleaded guilty to the alternative charge and admitted to the facts of the case.

[18] In fact, according to the notes of proceedings (RR17), the learned judge F said that the sentencing was within his discretion and only the charge was reduced. This corroborates the prosecution's version that the plea bargaining of the charge was conducted and not a plea bargaining of the sentence. Our finding is also fortified by the fact that after the respondent pleaded guilty to the alternative charge, the learned DPP asked for a heavy sentence (RR19).

G **[19]** On a scrutiny of the appeal record, we are satisfied that the parties entered into a plea bargaining of the charge. The sentence was left to the discretion of the learned judge; in other words, there was no agreement on the sentence. As such, there is no impediment to the prosecution lodging an appeal as they did in this instance.

H **[20]** We are also satisfied that the guidelines for plea bargaining process as set out by the Court of Appeal in *PP v. Manimaran Manickam* (*supra*) has been complied with. As such, we are satisfied that the respondent's plea of guilty was an unqualified plea of guilty to the charge. In the circumstances, we do not think that this is a suitable case to set aside the conviction and sentence I and remit the case to the High Court for a retrial before another judge on the original charge.

[21] We will now address the issue of sentence. The prosecution's main complaint is that the sentence was wrong and manifestly inadequate.

[22] In this instance, the offence carries a maximum sentence of 30 years and a fine. According to the facts of the case:

(a) At about 8.35pm on 1 June 2010, one Chin Eng Guan ("Chin") in a state of panic and fear came to the Sik Police Station to report that his friend (the deceased) had been shot by an unknown person at Jalan Raya Kampung Batu 8 Sik;

(b) A police party despatched to the scene found the deceased who was drenched in blood lying slumped in the car;

(c) According to police investigations the deceased was a scrape rubber dealer. On morning of 1 June 2010 at about 8am, Chin and the deceased were at Bukit Kayu Hitam to exchange RM90,000 into Thai Baht for the purposes of buying scrape rubber;

(d) Chin and the deceased then went to Kilang Getah Chong Huat Sg Petani to collect a cheque for RM113,000. After the cheque was collected, the cheque was handed over to Rahim a partner of the business to cash the cheque. Rahim collected the cash at the CIMB Bank Sg Petani branch and banked it into their account in Maybank Sg Petani branch. Rahim later withdrew all the cash at the Maybank Baling branch;

(e) Chin and the deceased then went to Betong, Thailand to buy rubber. After the transaction was concluded, they returned to Alor Setar at about 6.30pm;

(f) En route to Alor Setar, Chin received a telephone call from a handphone (No. 019-5252405). The caller was a Malay person who said that he is a friend of one Mail, Chin's friend;

(g) The caller asked if Chin wanted to buy rubber to which Chin agreed. At that time, Chin and the deceased were approaching Sik, Kedah. Chin asked the caller to meet in Sik and the caller agreed;

(h) The car in which Chin and the deceased were travelling from Betong to Sik was driven by the deceased. Chin and the deceased waited for about 20 minutes but the caller did not show up. Chin called back the handphone number. The caller told Chin that he was in Sik and asked Chin to go to Sik. Chin and the deceased waited for the caller along the road side of Jalan Pekan Sik;

(i) Five minutes later, a car came up and stop alongside the right side of the car in which Chin and the deceased were in. The deceased wound down the driver side window. The occupant in the other car wound down the passenger side window and fired a shot at the deceased. The deceased slumped in the car and Chin saw that the shooter wanted to fire a shot at him;

(j) Chin dashed out of the car and ran away and was saved by members of the public operating a nearby burger stall;

(k) The respondent was arrested on 21 January 2011 at the Kulim Hospital. Acting on information, the following exhibits were seized:

i. Satu beg kanvas warna hijau yang berisi 1 batang besi paip seperti barrel panjang lebih kurang 21 inci;

ii. Batang besi paip seperti penyambung barrel panjang lebih kurang 12 inci;

iii. Kayu yang ditampal pelapik kulit (handguard) bersama 1 allenkey;

iv. 1 udi senapang; dan

v. 2 butir peluru penabur 12 bore warna biru tentera tulisan Rio 20 Super Game.

(l) The exhibits were sent for examination by the Firearms Unit which found that the weapon was in good functioning order and the bullets were active and ignited;

(m) The deceased was sent to the Hospital Sultanah Bahiyah for post-mortem. The pathologist found that the cause of death to be "Gunshot injury to the head"; and

(n) By reason of the above facts, the respondent committed the act which caused the death of the deceased which he intends to cause death, ie, the offence of culpable homicide not amounting to murder.

[23] In essence, this is an appeal against the exercise by the learned judge of a discretion vested in him. The core issue is whether in the circumstances the sentence is so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law or some description. In this context, we would refer to the illuminating passage in *Bhandulananda Jayatilake v. PP* (*supra*) where Raja Azlan Shah Ag LP (as HRH then was) said at p. 84:

> … Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson b Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore, sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.

> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion.
> …

[24] As a general rule, the mere fact that an appellate court would have imposed a different sentence is not enough to warrant interference (*PP v. Mohamed Nor & Ors* [1985] 1 LNS 25; [1985] 2 MLJ 200,202; *PP v. Fam Kim Hock* [1956] 1 LNS 83; [1957] MLJ 20; *Rahim Usoff & Ors v. PP* [1984] 2 CLJ 121; [1984] 2 CLJ (Rep) 439; [1985] 1 MLJ 241).

[25] Appellate intervention with sentence may, however, be warranted in the following instances:

(i) Where the sentence is manifestly inadequate or excessive (*PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256);

(ii) Where the sentence is manifestly wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances (*Fan Yew Teng v. PP* [1975] 1 LNS 38; [1975] 2 MLJ 235, 238 (FC); *PP v. Loo Choon Fatt* (*supra*); *Rex v. Teo Cheng Lian and Rex v. Leck Kwee Ser* [1949] 1 LNS 81; [1949] MLJ 170);

(iii) The trial judge was proceeding on wrong principles (*Rex v. Leo De Cruz* [1935] 1 MLJ 1 (CA));

(iv) The trial judge had fallen into error by taking into consideration irrelevant matters or by committing some error of law (*Bhandulananda Jayatilake v. PP* (*supra*); *Rahim Usoff & Ors v. PP* (*supra*); *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645; [1985] 2 MLJ 414);

(v) An essential principle of justice has been infringed in such circumstances as to occasion a substantial miscarriage of justice (*Ramli Kechik v. PP* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 (SC); *PP v. Shari Mohd Shariff* [2005] 5 CLJ 439; [2005] 4 AMR 212; [2005] 4 MLJ 763; *Anuar Abdul Aziz v. PP* [2005] 6 CLJ 309);

(vi) The learned judge has erred as to the proper factual basis and in appreciating; the materials placed before him (*PP v. Dato' Waad Mansor* [2005] 1 CLJ 421; [2005] 1 AMR 509; [2005] 2 MLJ 101 (FC)); or

(vii) It is shown that the court imposing the sentence was embarking on some unauthorised or extraneous or irrelevant exercise of discretion (*Bhandulananda Jayatilake v. PP* (*supra*)).

[26] In his judgment, the learned judge said that in passing sentence he took into account public interest and the fact that sentencing is the discretion of the trial court (*Haridas Subramaniam & Anor v. PP* [2012] 1 CLJ 693; *PP v. Loo Chang Hock* [1988] 1 CLJ 76; [1988] 2 CLJ (Rep) 263; *PP v. Muhamad Arif Sabri & Ors* [2014] 1 LNS 604; [2014] 6 MLJ 282 (CA)).

A **[27]** In this case, the maximum sentence which could be imposed on the respondent under s. 304(a) of the Penal Code is imprisonment for a term of 30 years.

[28] Generally speaking, a plea of guilt is a strong mitigating factor operating in favour of an accused. However, there may be cases where the
B offence committed is so serious and the circumstances in which it was committed was so heinous that a plea of guilt need be given little or no weight (*Kesavan Baskaran v. PP* (*supra*)).

[29] In this case the deceased was shot at close range in cold blood. Seven
C pellet fragments were embedded in the deceased's head and face. The pathologist opined in his report that the gunshot injury to the head was directly fatal in nature. The learned judge appeared to have given undue emphasis to public interest but not to the manner in which the offence was committed.

D **[30]** Having regard to the manner the crime was committed in such a cold blooded and cruel manner. The respondent's plea of guilty in our judgment ought to be given no weight. Accordingly, on the peculiar facts of this case it does not operate as a mitigating factor.

[31] Having considered all the circumstances we are of the considered view
E that the sentence of ten years imprisonment imposed by the learned judge is manifestly and grossly inadequate having regard to the manner in which the respondent committed the offence. In all the circumstances of the case we consider a term of 18 years imprisonment to be appropriate. In imposing that term we have considered the respondent's age and other mitigating factors
F operating in his favour.

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